**IDRIS MEON**

**v.**

**SRI RAMBAI SDN BHD**

HIGH COURT MALAYA, MUAR
SULONG MATJERAIE JC
[ORIGINATING SUMMONS NO: 24(HP)207-1996]
28 DECEMBER 1998

***CONTRACT:*** *Building contract - Agreement to develop land - Uncertainty - Construction of terms - Ambiguity in terms - Whether null and void*

***LAND LAW:*** *Transfer - Fitness of instrument - Void instrument - Whether can effectively transfer rights, title and interest*

Pursuant to an agreement dated 1 January 1989, the plaintiff transferred two lots of land to the defendant, in consideration of the defendant developing the said land and giving the plaintiff RM554,000 or 17 units of houses in lieu of cash. The transfer was duly registered at the Registry of Land, Kluang. However, the development of the said land was not completed. The plaintiff then applied to the court for a declaration that the agreement was null and void on the ground that it was wrong in law due to uncertainty of terms. The defendant contended otherwise arguing that the plaintiff had failed to comply with cl 7 of the agreement, *ie,* failing to give the required three months' notice.

**Held:**

**[1]** The agreement contained an element of uncertainty as nothing was stipulated as to when the building plans must be submitted for approval.

**[2]** Since the defendant did not possess a valid license issued under s. 5(1) Housing Developers Act 1966, it could not commence construction on the said land. The court therefore took judicial notice of that fact and refused to enforce the contract even though its illegality was not pleaded by the plaintiff.

**[3]** The transfer documents which were registered with the Registrar of Land could not effectively transfer the rights, title and interest to the defendant as the registration was obtained by means of void instruments.

*[Order in terms of the plaintiff's application.]*

**Case(s) referred to:**

*Aberfoyle Plantations Ltd v. Cheng [1959] 3 All ER 910* ***(refd)***

*Archbolds (Freightage) Ltd v. S Spanglett Ltd [1961] 1 QB 374* ***(refd)***

*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675* ***(refd)***

*Hajara Singh v. Muthukaruppan & Ors [1967] 1 MLJ 167* ***(refd)***

*Harvey v. Pratt [1965] 2 All ER 786* ***(refd)***

*Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surian Singh & Ors (Interveners) [1996] 4 CLJ 52* ***(refd)***

*Lee Yew Hin v. Kow Lup Pion [1974] 1 MLJ 114* ***(refd)***

*Marshall v. Berridge [1881-85] All ER Rep. 908* ***(refd)***

*Mogul Steamship Co v. Mc Gregor Gow & Co [1982] AC 25* ***(refd)***

*MPRL Karuppan Chetty v. Suah Thian [1916] 1 FMS LR 300* ***(refd)***

*National Land Finance Cooperative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76* ***(refd)***

*Re Longlands Farm, Long Common, Botley, Hants Alford v. Superior Developments Ltd [1968] 3 All ER 552* ***(refd)***

*Siew Soon Wah & Ors v. Yong Tong Hong [1973] 1 MLJ 133* ***(refd)***

*Smith v. Butler [1900] QB 694* ***(refd)***

*St. John Shipping Corpn v. Joseph Rank Ltd [1957] 1 QB 267* ***(refd)***

*Smith v. Butler [1900] QBD 694* ***(refd)***

**Legislation referred to:**

Contracts Act 1950, ss. 5(1), (2), 6(1), 7A(1), (3), (10), 8(1), 24, 29, 30, 32

National Land Code 1965, ss. 47, 214(2)a, 241(3)(a), 340(1), (2)(b), forms 14A, 24

Housing Developers Act 1966, s. 5(1)

**Other source(s) referred to:**

*Halsbury's Laws of England*, 4th edn, vol 9 para 266

*For the plaintiff - En Sukumaran (Mastura Rahim with him); M/s C Sukumaran & Co*

*For the defendant - Zulkafli Abd Hamid; M/s Hasim & Co*

*Reported by Izzaty Izzudin*

## JUDGMENT

**Sulong Matjeraie JC:**

***Background***

By way of an Originating Summon (encl. 2) the plaintiff applied to the court for a declaration that the agreement between the plaintiff and defendant dated 1 January 1989 on two landed properties under HS(M) Lot 3410 Mukim Ulu Benut, Daerah Kluang, Negeri Johor and HS(M) 237 PT LO 1446 Mukim Ulu Benut, Daerah Kluang, Negeri Johor be declared null and *void*. The other two prayers are consequential prayers, and costs as well as other orders deemed just and proper.

Y.A. High Court Judge Muar, Johor on 8 July 1997 handed down the following orders:

1. Perjanjian bertarikh 1hb Januari, 1989 yang ditandatangani oleh Plaintif dan Defendan tidak batal dan ianya tetap berkuatkuasa;

2. Perjanjian bertarikh 1hb Januari, 1989 telah memperuntukan remedi yang mencukupi bagi pihak-pihak didalam perjanjian jika berlaku kemungkiran oleh mana-mana pihak didalam perjanjian;

3. Plaintif boleh mendapat gantirugi jika berlaku kemungkiran perjanjian oleh pihak defendan sebagaimana diperuntukan didalam perjanjian;

4. Permohonan Plaintif adalah dengan ini ditolak dengan kos.

An appeal against the above decision was made before the Court of Appeal under Rayuan Sibil No. J 02-458 Tahun 1997 where on 17 November 1998 the appeal by the appellant/plaintiff was allowed with the following orders:

(a) tindakan Perayu/Plaintif terhadap Responden/Defendan akan didengar semula oleh seorang Hakim Mahkamah Tinggi yang lain dalam tempoh satu bulan dari tarikh disini;

(b) Deposit sebanyak RM500.00 dikembalikan kepada Perayu/Plaintif.

(c) Kos di Mahkamah ini serta di Mahkamah Tinggi dibayar oleh Responden /Defendan kepada Perayu/ Plaintif.

Both counsel requested this court to examine closely cl. 7 of p. 35 of Ikatan Dokumen (lD). This they said, was the directive from the Court of Appeal, for it is possible that there may have been a misdirection here.

***Agreed Facts***

1. An agreement was signed on 1 January 1989 between the landowner/ plaintiff and defendant/the developer (hereinafter referred to as "the agreement") to develop two parcels of land held under HS (M) 237 PT LO 1446, Mukim Ulu Benut Daerah Kluang, Johor and HS (M) 368 PT 3410, Mukim Ulu Benut Johor (hereinafter jointly called "the said land").

2. In consideration of the said land being transferred to the defendant, the plaintiff was to be given RM554,000 or ten (10) units Bumiputra single storey medium cost terrace houses and seven (7) single storey low cost houses to be constructed by the defendant on the said land.

3. In lieu of cash payment, the plaintiff was to be paid by way of 17 units of houses as outlined at two above.

4. The transfer of the said land was executed by way of borang 14A to the defendant on 28 March 1992 and the transfer was duly registered at the office of registrar of Land Kluang on 27 October 1993.

5. Up till today the housing project has not been completed.

***Plaintiff's Case***

The plaintiff is praying for a declaration that the agreement dated 1 January 1989 in respect of two parcels of land under HS (M) Lot 3410 Mukim Ulu Benut, Daerah Kluang, Negeri Johor and HS(M) 237 PT LO 1446 Mukim Ulu Benut, Daerah Kluang, Negeri Johor be declared null and *void*.

Reasons given were as follows:

1. Uncertainty.

It was argued by Mr C Sukumaran, learned counsel for the plaintiff that the agreement is wrong under the law because of the uncertainty of the terms of the agreement.

Clause 1(c) of the agreement stipulates:

1. The developers (defendant) shall perform and undertake to:

a) ...

b) prepare and submit the earth works and building plans to the relevant authorities for the approval;

c) construct and complete the dwelling houses upon approval by the State Authority within the time stipulated and subject to cl. 9(i)(ii) and (iii).

Clause 9 says:

9. For the purpose of this agreement, the date of commencement of construction of the dwelling houses shall mean and be construed if the following events have taken place:

(i) earth-works and building plans have been approved;

(ii) the Developers' license and advertising permit have been approved by the relevant authority;

(iii) at least fifty (50%) per cent of all the houses will have been booked and sale and purchase agreements have been executed between the Developers and the potential buyers (which percentage shall be at the discretion of the Developers)

The plaintiff alleged that time is not specified in the agreement. There is therefore uncertainty to time.

Clause 8 however stipulates:

> In the event no construction of the dwelling houses has commenced within thirty-six (36) months from the date of commencement of construction the Developers shall transfer back the said land to the landowner without costs.

The agreement, it was argued, failed to specify the date or time of commecement, and its completion. By virtue of s. 30 Contracts Act 1950 which says:

> Agreements, the meaning of which is not certain, or capable of being made certain, are *void.*

The agreement is therefore void stressed the learned counsel for the plaintiff. The case of *Hajara Singh v. Muthukaruppan & Ors* [1967] 1 MLJ 167 was quoted. The Federal Court said that the expression "for as long as he wished during his lifetime" cannotes uncertainty and "the agreement is therefore *void*" per Barakbah LP at p. 167.

This was supported by the case of *MPRL Karuppan Chetty v. Suah Thian* [1916] 1 FMS LR 300.

Learned counsel also quoted *Halsbury's Laws of England*, fourth edn, vol. 9 para. 266 which says:

> 266. The requirement of certainty. The general rule is that, if the terms of an agreement are so vague or indefinate that it cannot be ascertained with reasonable certainty what is the intention of the parties, there is no contract enforceable at law.

In *Harvey v. Pratt* [1965] 2 All ER 786 (CA) Lord Denning, M.R. quoted Lush, L.J in *Marshall v. Berridge* [1881-85] All ER Rep. 908:

> There must be a certain beginning and a certain ending...

Further he said at p. 788.

> This is an agreement for a lease to start at some future time. The time has never been specified or agreed. There was, therefore, no concluded contract.

It was therefore submitted that any agreement must specify the time, failing which, by s. 30 Contracts Act 1950, the agreement is *void.*

***Reasonable Time***

In the event that time is not specified then "a reasonable time must be given."

Important dates:

(i) The agreement was executed on 1 January, 1989.

(ii) Sub-division and conversion approved on 20 February, 1989 - (p. 61 I.D)

(iii) Building plan approved on 30 December, 1990 - (p. 79 I.D)

(iv) Defendant applied for developer's licence on 14 April, 1993 (p. 73 I.D). This is almost 2 1/2 years after the building plan was approved.

(v) The said land had been transferred to the defendant and the transfer was registered on 27 October, 1993. (p. 40-43 I.D)

The issue here is, according to the learned counsel for the plaintiff, has the defendant been given a reasonable time to complete this project?

Clause 6(b) of the agreement - (page 35 ID)

> (b) diligently proceed with and complete the said works or cause the same to be diligently proceeded with and completed so that the same shall be completed within **a reasonable time,** ... " (emphasis is mine).

In *Smith v. Butler* [1900] QB 694 (CA) Romer LJ said at p. 699 that:

> to my mind it is reasonably clear that the Vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor.

Another case quoted by the learned counsel for the plaintiff was *Re Longlands Farm, Long Common, Botley, Hants Alford v. Superior Developments, Ltd* [1968] 3 All ER 552 (Chancery Division) Cross J.

> The question then arises, what is the time in which the condition is to be performed? The document is silent on that point. It simply says that the contract is conditional on the defendant obtaining planning permission to their satisfaction and the question of title being approved.

The words of Romer LJ in *Smith v. Butler* was adopted by the Privy Council in *Aberfoyle Plantations Ltd v. Cheng* [1959] 3 All ER 910.

> Two other points seem to be clear, first that the reasonableness of the time must be determined as at the date of the contract and that what is reasonable must be judged by an objective test applicable to both parties, and does not simply mean what is reasonable from the point of view of the defendants.

Learned counsel for the plaintiff submits that the principle is, if no time is fixed, then a reasonable time should be given.

Applying this principle to this instant case, has the defendant been given a reasonable time to complete the project? The agreement was signed on l January 1989 and by today 28 December 1998 (the hearing day) - it is almost ten years. Plaintiff signed the agreement when he was 53 years and now he is 63 years.

Subdivision plan has been approved. The building plan has been approved.

Developers licence has not been approved.

At p. 57 ID there was a letter dated 5 November 1995 from the defendant addressed to Messrs Idris & Co. as solicitors for the plaintiff. Paragraph 2 said as follows:

> Untuk maklumat tuan, pembinaan tidak dapat diteruskan oleh Syarikat ini oleh **kerana lesen pemaju perumahan tidak dapat dikeluarkan oleh pihak Pengawal Perumahan kepada Sri Rambai Sdn. Bhd.** atau Prime Development Sdn. Bhd. (emphasis is mine).

In their affidavit in reply affirmed on 24 October 1996 (from pp. 11 to 211 1D) the defendant failed to explain why developers licence cannot be issued to them. No reason was given.

As stated earlier (letter from the defendant at p. 57 1D) the defendant, cannot proceed with the commencement of the construction work.

It was submitted therefore by the plaintiff that:

(i) the whole agreement therefore comes to an end;

(ii) From 1989 up to the date of hearing, more than reasonable time had been given to the defendant.

(iii) agreement was made during good time as opposed to the current economic constraint faced by the country.

***Developers Licence***

The defendant did not object to the letter dated 20 July 1995 from plaintiffs solicitors (Page 50 1D). Paragraph 2 thereof requested for a written statement from the defendant on the date of commencement of the work and expected date of completion.

A letter at p. 52 1D as well as the letter at p. 59 1D were written to the defendant and their contents are not disputed by the defendant. The first letter was to confirm that the plaintiff was proceeding with a civil suit against the

defendant and the second was to terminate the agreement dated l January 1989 and requesting for the return of the document of title in respect of the said land to the plaintiff.

***Termination***

Clause 7 of the agreement reads as follows:

> "7. In the event the Developers are unable to complete the dwelling houses, the Landowner shall give notice in writing to the Developers giving the Developers three (3) months to re-commence construction and completion of the dwelling houses from the date of receipt of such notice, failing which the Landowner shall complete or engage other contractors to complete the dwelling houses and charge all costs to the Developers which are agreed upon by the Developers or the Landowner shall make a claim against the Developers for liquidated damages equivalent to the sale of the said seventeen (17) dwelling houses as in clause 3 herein.

The defendant alleged that the plaintiff failed to comply to the provision of the above mentioned cl. 7. The plaintiff, according to the defendant must give three (3) months notice.

The learned counsel for the plaintiff argued that cl. 7 would only apply when the developer has ccommenced construction but for one reason or other he has stopped then, only then, the plaintiff must give three (3) months notice in writing to **re-commence construction.**

He suggested two key phrases:

(i) the developers "are unable to complete"; and

(ii) to re-commence construction.

Therefore it is the submission of the learned counsel for the plaintiff that if the construction has stopped then the landowner will be required to give notice of three months notice to recommence construction.

Learned counsel further argued that cl. 7 of the agreement is not applicable to this instant case for the following reasons:

(a) the provision of the Housing Developers (Control and Licensing) Act, 1966 (hereinafter referred to as the "Act" ) -

Interpretation of " Housing developer" and "housing development".

"Housing developer" "means any person, body of persons, company, firm or society (by whether name described), who or which engages in or carries on or undertakes or causes to be undertaken a housing development."

> "Housing development" means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four units of housing lots by the landowner or his nominee with a view of constructing more than four units of housing accommodation by the said landowner or his nominee."

However under s. 5(1) of the Act there is a prohibition against housing development except by virtue of a licence when it says:

> 5(1) No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.

The letter dated 5 November 1995 from the defendant at p. 57 1D indicated that the developers licence cannot be issued to them.

This, according to the learned counsel, means that the defendant has no developers licence and as such could not have commenced any construction work - s. 5(1) of the Act. He argued that construction has not begun. Therefore his submission was that cl. 7 of the agreement does not apply. Hence he submits that the plaintiff need not give three (3) months notice. The notice of termination, the one dated 10 January 1996, after sending two other letters, was sufficient. Further, the learned counsel for the plaintiff notified this court that the Court of Appeal on 17 November 1988 took the sentiment that the learned High Court Judge Muar misdirected himself on cl. 7 of the agreement.

***Is The Developer (Defendant) Able To Perform The Agreement?***

At p. 71 of ID there is a letter from CNCEC (Malaysia) Sdn Bhd ("CNCEC") addressed to the defendant. This letter is an exhibit annexed to the affidavit of the defendant affirmed on 24 October 1996 on the subject of the development on the said land.

Learned counsel said that there was a deed of assignment Re TLE /3292/92 where the defendant had a joint venture agreement with CNCEC whereby CNCEC "will manage construct and sell the houses" and CNCEC will open a joint-venture account where CNCEC **will fully control the account**. All proceeds from the sales shall be accounted into the joint-venture account which both party have their nominee" to sign the account.

It was submitted by the plaintiff that the deed of assignment on joint venture basis between the defendant and a third party was done without the approval of the plaintiff. It was a private arrangement he alleged.

Further it was a submitted that there is no provision in the agreement signed between the plaintiff and the defendant to allow for such joint-venture between the defendant and a third party.

***Section 7A Of The Act***

Learned counsel for the plaintiff pointed out the provisions s. 7A(1) of the Act which stipulates that every housing developer shall open and maintain a housing development account with a bank for each housing development undertaken and the licensed housing developers are required to pay into the housing development account all purchase money received - s. 7A(3) of the Act. The objective is to control the proceeds of sale.

It was submitted that the letter from CNCEC (Malaysia) Sdn Bhd at p. 71 ID is contrary to s. 7(A)(1) and s. 7(A)(3) of the Act. By s. 7(A)(10) any housing developer who contravenes or fails to comply with this section shall be guilty of an offence and on conviction be liable to a fine or not less than ten thousand ringgit and shall also be liable to imprisonment for a term of not exceeding three years or to both.

Further it was also submitted that not only the joint venture agreement between the defendant and CNCEC did not have the consent of the plaintiff, it also contravened s. 8(1) of the Act which requires that any proposal to enter into an arrangement or agreement to sell, dispose of or reconstruct his business relating to housing development either by amalgamation or otherwise, the licensed housing developer shall as soon as possible notify the controller and unless approved by the controller of housing, the housing developer shall not proceed with that arrangement or agreement.

The learned counsel of the plaintiff said the letter at p. 71 ID shows that the joint venture agreement was not a contract to construct the houses but a joint-venture on sales proceeds. It was therefore submitted that the defendant is unable to proceed with the project on their own as envisaged and agreed to under the agreement dated l January 1989.

The learned counsel for the plaintiff submitted and summarised the plaintiff arguments as follows:

The defendant was unable to proceed with the project on its own as agreed under the agreement dated 1 January 1989. The agreement should be declared null and *void* because:

1. Uncertainty and authorities are as elaborated earlier;

2. Where no time has been fixed in the agreement then the defendant must complete within reasonable time;

3. Defendant has notified the plaintiff that they are unable to proceed with the construction because they cannot be issued with the developer's licence;

4. The letter at p. 71 ID suggests that the defendant cannot undertake the project on its own;

5. The agreement dated 1 January 1989 was reasonably and properly terminated. Clause 7 of the agreement is not applicable as the defendant has no licence. As such they could not have "re-commenced" the construction as envisaged under the agreement.

Plaintiff therefore prays for the following:

(a) Order in terms of prayer No. 1 to declare that the agreement dated 1 January 1989 null and *void* because of uncertainty.

(b) The said land be ordered to be transferred back to the plaintiff.

As consideration, 17 units of houses of various types were accepted as payment *in lieu* of cash to be given to the plaintiff. The parties to the agreement were the plaintiff and the defendant.

The agreement on all occasion referred to the defendant as the developer.

Section 5(2) of the Act stipulates that except with the written consent of the controller, no housing developer other than a licensed housing developer shall assume or use in relation to his business the words "housing developer". Further it was submitted that up to 5 November 1995, some six years after the execution of the agreement, the defendant failed to get a housing developer's licence. It was therefore argued by the counsel for the plaintiff that on 1 January 1989 the defendant was not a housing developer within the meaning of the Act. The case adduced as authority was:

*Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd (Bhagat Singh Surian Singh & Ors, Interveners)* [1996] 4 CLJ 52; [1996] 2 MLJ 431. (Hereinafter referred to as *"Keng Soon Retnam"*)

In this case, *MK Retnam Holdings Sdn. Bhd* (defendant) charged their various parcels of land to *Keng Soon Finance Bhd* as a security for a bridging loan. One of the issues raised was whether the charge created over the land was *void.*

One of the significant facts revealed was that the defendant did not possess a developer's licence in breach of s. 5(1) of the Act. The Judicial Committee of the Privy Council concluded that the issue of illegality stemming from the unlicensed nature of the defendant's business was substantial issue of fact and

held that as the contract has been prohibited by the Act, then the result is that such a contract (in this case, the charge) is void and unenforceable pursuant to s. 24 of the Contracts Act 1950.

The learned counsel suggested that s. 3 and 5(1) of the Act are relevant. The word "develop" found in s. 3 of the Act has been defined to mean "to construct or cause to be constructed" more than four units of housing accommodation, per Anuar J in *Keng Soon Retnam (supra)* who also said at p. 447 (at p. 67 in CLJ) therein that:

> it is clear ... that a housing developer **must be in possession of a licence** issued under the Act before it engages in carrying on or undertaking the housing development. This is an absolute prohibition.

A court will not enforce a contract "which is expressly or impliedly prohibited by statute" per Devlin J at p. 238 in *St. John Shipping Corpn v. Joseph Rank Ltd* [1957] 1 QB 267 and followed in *Keng Soon Retnam (supra)* when the court ascertains that the contract has been prohibited by the Act, then the result is that such a contract (in this case, charge) is void and unenforceable because of unlawful consideration pursuant to s. 24 of the Contracts Act, 1950.

Learned counsel for the plaintiff also quoted as authority the case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 MLJ 356 (Supreme Court) where Hashim Yeop A Sani CJ held at p. 681:

> Thus in our view, it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.

It was also adduced by the learned counsel that in *Kheng Soon Retnam's* case *(supra)* that the court takes judicial notice of the fact and refuses to enforce the contract, even though its illegality has not been pleaded by the defendant. The fact that the Housing Development Act 1966 is a legislation with the primary intention of protecting the consumer makes the contract clearly one which "on its face" is illegal: *Archbolds (Freightage) Ltd v. S Spanglett* [1961] 1 QB 374. "A contract that is illegal as formed in its inception and is void *ab initio* is treated as if it had not been made at all (*Mogul Steamship Co. v. Mc Gregor Gow & Co* [1982] AC 25 at p. 39 per Lord Halsbury)."

***Transfer By Instrument In Form 14A & Defeasibility Of Title And Interest***

At p. 45 ID (Form 14A - National Land Code 1965) the consideration for the transfer of the said land was 17 units of houses of various types which will be built by the defendant.

But it was argued that clearly the developer must be in possession of a licence issued under the Act before it engages in undertaking a housing development.

It was submitted that when form 14A was executed there was an undertaking to deliver 17 houses. If that contract is *void,* based on *Keng Soon Retnam's* case, it was argued and submitted that the title or interest shall not be indefeasible. This court is in agreement with this submission.

Learned counsel argued that in *Keng Soon Retnam's* case, land was charged and the power to charge is governed by s. 241 of the National Land Code (NLC). However such power is subject to "any prohibition or limitation imposed by this Act or any other written law for the time being inforce," per s. 241(3)(a) NLC.

In *Keng Soon Retnam's* case Annuar J said at p. 72 that "the plaintiff, as intended chargee, could not receive such a security because it had:

(a) no developer's licence to provide money for housing development; and

(b) no powers to provide finance for such an unlicensed business of housing development by the unlicensed housing developer.

Consequently, the purported charge was a nullity and was incapable of being registered to create any security over the land's 59 lots."

It was submitted further by the learned counsel for the plaintiff that the words found in s. 241(3)(a) NLC is in *pari materia* with the wording found in s. 214(2)(a) NLC in that the latter also said the power shall be exercisable subject to "any prohibition or limitation imposed by this Act or any other written law for the time being in force."

It was also submitted that the phrase "... any other written law for the time being in force" found in ss. 214(2)(a) and 241 (3)(a) NLC means for this instant case the housing developers (Control And Licensing) Act 1966. When one has no licence issued under the Act, then one is prohibited from being a housing developer.

On indefeasibility learned counsel quoted p. 74 of *Keng Soon Retnam's case* and is reproduced hereunder:

> The charge takes effect under s. 234 of the NLC upon registration but the instrument of dealing, *ie,* creation of charge being void *ab initio* would be a void instrument for the purpose of registration, *ie,* although it was capable of being registered, it was not capable of effecting any charge over the 59 lots.

> As a consequence, there is in existence no effective or valid registered charge as envisaged under the NLC. Therefore, the plaintiff cannot get the order for sale from the Court, for the prerequisite to obtain the order for sale is that there must be a valid registered charge created in favour of the Plaintiff.

Learned counsel for the plaintiff suggested that the above needs to be read with s. 340 NLC where under subs 2(b) it says that:

> (2) The title or interest of any such person or body shall not be indefeasible
>
> (a) ...
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument;

In *Keng Soon Retnam's* case, the charge instrument was declared void. Being void instrument, it fell under s. 340(2)(b) NLC. As such the learned judge ordered to cancel the charge memorials over the lands held and the senior assistant registrar was ordered to execute a memorandum of transfer.

*Keng Soon Retnam's* case involves form 16A but in this instant case it involves form 14A of NLC. As earlier submitted the wording of s. 214(2)(a) and s. 241(3)(a) NLC are exact provision. Learned counsel for the plaintiff submitted the following:

(1) That the agreement dated 1 January 1989 is *void* and as such the transfer of the said land be cancelled;

(2) That the consideration being 17 units of houses cannot be delivered as before the defendant can undertake to deliver they must have a licence under s. 5(1) of the Act. The fact that the licence has never been issued to the defendant, they cannot deliver that 17 units of houses;

(3) That the agreement is contrary to statute and becomes as offence under the statute;

(4) That if something is void and prohibited by statute, then by s. 24 of the Contracts Act, such contract becomes *void* altogether;

(5) That since the defendant has no licence, the transfer document - form 14A can be registered but it is a *void* instrument. Being *void*, the title becomes defeasible under s. 214(2)(a) NLC and also under s. 340 (2)(b) NLC.

(6) That the two parcels of land be transferred back in favour of the plaintiff and that, the defendant be directed to sign and execute the instrument of transfer failing which the Deputy Registrar or Senior Assistant Registrar

High Court Muar and that the Pentadbir Tanah Daerah Kluang be directed to register the said instrument of transfer;

(7) Costs to the plaintiff.

***Defendant's Case***

The learned counsel for the defendant outlined their reply as follows:

**(1) Uncertainty**

Based on the facts of the case and the agreement signed on 1 January 1989, it can be seen clearly to be a valid contract complete with its offer, acceptance and consideration.

At the premable of the agreement (page 31 ID) the consideration is clearly stated in that in consideration of the landowner (plaintiff) transferring "all those pieces of land held under HS(M) 237 MLO 1446 and HS (M) 368 PT 3410 both in the Mukim Ulu Benut, District of Kluang (hereinafter referred to as "the said land") to the developers" (defendant), the defendant shall pay RM554,000 to the plaintiff or ten units single storey medium - cost terrace house and seven units of the single storey low cost house to be constructed on the said land together "with separate titles and certificates of Fitness For Occupation at the expenses of the defendant.

Learned counsel for the defendant said that time has been specified or situations where the defendant was required to commence work. It was submitted that cl. 9 of the agreement provides the date of the commencement of the construction of the dwelling houses shall mean and be construed if the following events have taken place:

(i) earth - works and building plans have been approved;

(ii) the developer's licence and advertising permit have been approved by the relevant authority;

(iii) at least fifty (50%) percent of all the houses will have been booked and sale and purchase agreements have been executed between the defendant and the potential buyers (which percentage shall be at the discretion of the defendant).

The three conditions, submits the learned counsel should be read together as they are inter related. The completion date could be found in cl. 6(b) of the agreement where it says that:

as soon as reasonably practicable after the defendant have entered upon the site they shall commence or cause to the commenced (sic) on the works as they shall in their discretion consider likely to realise the greatest capital value

and the following provisions shall have effect in regard to the said work what is to say the defendant shall:

(a) ...

(b) diligently proceed with and complete the said works or cause the same to be diligently proceeded with and completed so that the same shall be completed within a reasonable time, ...

It was the submission of the defendant that the hereinbefore mentioned provisions clearly stipulate the time for commencement of work and the completion thereof. Although the agreement did not stipulate the exact period in term of months and or years but there are decided authorities which show that "reasonable time" can be used and accepted by the courts. See:

*Siew Soon Wah & Ors v. Yong Tong Hong* [1973] 1 MLJ 133 (Privy Council) The principle laid down by this case was that where a lease for letting out a premise for as long a period as it was within his power to do so and that he should not be able to eject the respondent so long as he paid the stipulated rent and that the respondent should be entitled to occupy the property so long as he wished and so long as he paid the rent. The period, though not specified, was thirty years.

Based on the provisions in cl. 9 and 6(b), the defendant submits that the period of commencement of work and its completion are provided for in the agreement. There is therefore no element of uncertainty.

It was also argued by learned counsel for the defendant that the facts of the cases, adduced as authorities by the plaintiff are different from the facts of this instant case. Few examples were given *ie, Hajara Singh v. Muthukaruppan & Ors* [1967] 1 MLJ 167 where there was an oral agreement between the appellant and the landowner allowing him to occupy the land "for as long as he wished during his lifetime." It was held by the Federal Court that the oral agreement was void for uncertainty. Similarly the case of *MPRL Karuppan Chetty v. Suah Thian* [1916] FMS LR vol. l 300 where the Appeal Court ruled that the document to hold the premise was too vague and uncertain to constitute a valid agreement was considered void under s. 29 of the Contract Enactment. Another case quoted was the Court of Appeal's case of *Smith v. Butler* [1900] QBD 694 where the principle laid down by Romer LJ at p. 699, was that:

> To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor.

As such it was submitted that uncertainty cannot be said to have existed in the agreement between the plaintiff and defendant.

As such the agreement still subsist.

***Reasonable Time***

The learned counsel for the defendant said that the reasonable time to commence the work would be dependent upon the three conditions under cl. 9 of the agreement.

The facts of the case, argued the learned counsel, revealed that it was only on 14 April 1993 that the defendant applied to the appropriate authority to obtain a housing developers licence. This is because it was only in 1993 that the transfer of the said land was registered in the name of the developer. Prior to that only the first condition could be met, see p. 73 of ID.

***Contingent Or Conditional Agreement***

The defendant argues that the agreement is a contingent or conditional agreement within the meaning of s. 32 of Contracts Act. Therefore the commencement of the construction works depends on the situations as outlined in cl. 9(i),(ii) and (iii) of the agreement.

The above principle was applied in *National Land Finance Cooperative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] 2 MLJ 211 (Federal Court) where the purchaser shall complete the purchase within 14 days after obtaining the approval from the Foreign Investment Committee (FIC). When FIC refused to approve the sale, the Federal Court held that the agreement was void because neither the purchaser nor the seller had any control over the approval.

It was argued further that this principle was also applied in *Lee Yew Hin v. Kow Lup Pion* [1974] 1 MLJ 114 (FC).

It was the contention of the defendant that the parties were aware that one of the conditions of the agreement between them would be contingent upon the conditions being met between the defendant and the plaintiff. Based on s. 32 Contracts Act, it was submitted by the learned counsel for the defendant that the defendant could only commence the construction work contingent upon cl. 9 (i), (ii) and (iii) being met and the responsibility of the defendant to hand over to the plaintiff the 17 units of houses after individual land titles have been issued and the issuance of certificate of fitness for occupation.

***Indefeasibility Of Title***

Learned counsel for the defendant argued that "the title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall subject to the following provisions of this section, be indefeasible," s. 340(1) NLC. The question of the plaintiff invoking s. 340(2)(b) to determine the ownership of the said land based on the transfer instrument being *void* because the defendant being the transferee contravened the Housing Developers (Control & Licensing) Act 1966 should not arise as it is the view of the defendant it has no relevance to the joint-venture agreement.

Both parties acknowledged that one of the conditions to be met by the defendant was to apply for housing developers licence and as such it was argued that the condition for the defendant to commence the work has not been achieved. Hence the argument that the defendant has breached the Housing Developers (Control and Licensing) Act 1966 resulting in the instrument of transfer *void* has not been proved.

***Sufficiency Of Remedies Available To The Plaintiff***

It was argued for the defendant that the remedy under cl. 7 of the agreement is wide and sufficient for the plaintiff in the event that the defendant failed to perform at the initial stage of the work or mid-way in the completion of the houses. The plaintiff has been provided with various options. The plaintiff could engage other contractors to complete the houses and charge all costs to the defendant or the plaintiff can claim against the defendant for liquidated damages equivalent to the sale of the 17 units of houses.

This court notes with regret that the learned counsel for the defendant failed to fully address and respond to the issue raised by the learned counsel for the plaintiff in respect of the portion "... **unable to complete** the dwelling house, the landowner (plaintiff) shall give notice in writing to the developers (defendant) giving the developers three months to **re-commence** construction and completion of the dwelling houses from the date of receipt of such notice, ..."

Learned counsel for the defendant did however submit the following:

(1) The joint venture agreement dated 1 January 1989 is still in force.

(2) Facts of this case revealed that the element of uncertainty does not arise in the agreement;

(3) This is a contingent contract and the terms to perform the agreement have yet to be achieved. The letter dated 14 April 1993 at page 73 ID to the controller of housing shows that the defendant is forwarding to him the particulars required including item 6 (form 14A), item 8 - cash flow and item 12 financial resources to develop the project. The application was not refused or rejected completely. The controller of housing sought for more details on 22 April 1993 from the defendant. The said letter at p. 75 ID shows that the housing developers licence applied for by the defendant has not been refused absolutely. Learned counsel for the defendant did not however discuss para. 2 of their letter at p. 57 ID *vis-a-vis* this argument.

The time between 1993 to 1996 during which time the plaintiff started this proceeding should be the time when the various question posed by the controller of housing be resolved jointly with the full cooperation of the plaintiff as a joint-venture partner. Unfortunately, this process stopped when originating summon against the defendant was filed on 16 May 1996.

(4) It would be unfair if the said land were to be transferred back to the plaintiff as the remedy provided under cl. 7 of the agreement is sufficient protection for the plaintiff.

On recommence the learned counsel for the defendant only said that the word "recommence" is wide. It is immaterial he claimed but argued that cl. 7 of the agreement is relevant as it provides the options or alternatives to the plaintiff.

As such the defendant urged the court to dismiss the application with costs.

**Court's Finding:**

The plaintiff is praying for a declaration that the agreement dated 1 January 1989 be declared null and *void.* The defendant maintained that the agreement is valid as it has all the basic features of a contract in that it is complete with its offer, acceptance and consideration. It was argued further that cl. 9 of the agreement provides for the date of commencement of the construction work after earth-works and building plans have been approved and that the developer's licence and advertising permit have been approved and a certain percentage of houses shall have been booked and sale and purchase agreement signed. Similarly, it was further argued that cl. 6(b) provides for the work to be completed within reasonable time. Therefore it was argued that there was stipulated a time for commencement of work and completion thereof.

'Reasonable time' has been accepted by our courts argued that defendant.

However this court notes that the authority offered *ie, Siew Soon Wah & Ors v. Yong Tong Hong (supra)* the Privy Council said that "there arose in the respondent's favour an equity or equitable estoppel protecting his occupation of the premise for a period of thirty years" per Viscount Dilhorne at p. 134. Further it was provided by statute then that the lease shall be no longer than 30 years - Section 47 of the Land Code (Chapter 138) of 1928. Therefore the lease was allowed to run for 30 years.

The plaintiff on the other hand argued that in the agreement time is not specified and as such there is uncertainty. By s. 30 Contracts Act 1950, agreements, the meaning of which is not certain, or capable of being made certain, are *void.*

The general rule is that if the terms of an agreement are so vague or indefinate that it cannot be ascertained with reasonable certainty what is the intention of the parties, there is no contract enforceable at law: *Halsbury's Laws of England,* 4th edn. vol. 9 para. 266.

There is also a provision at cl. 8 of the agreement which says that in the event that no construction of the dwelling houses has commenced within 36 months from the date of commencement of construction the defendant shall transfer back the two parcels of land back to the plaintiff without costs.

But what is the meaning of the date of commencement of construction? This is found in cl. 9 which has been quoted earlier where earthworks and building plans have been approved; the developer's licence and advertising permit have been approved by the relevant authority and at least 50% of all the houses will have been booked and sale and purchase agreement executed with potential buyers.

The plaintiff argued that there is no specified time when the three conditions on the meaning of the date of commencement must be satisfied. Is the plaintiff supposed to wait for one year, ten years? This, claimed the plaintiff, is uncertainty. When the plaintiff signed the agreement on 1 January 1989 he was 53 years old, now he is 63 years of age. Work has yet to start!

Undoubtedly there is an element of uncertainty. It is well and good that earth-work and building plans can be approved as a matter of course but nothing is stipulated as to when plans must be submitted for approval.

The agreement failed to say when the defendant was supposed to apply for developer's licence and advertising permit to the relevant authority. Must the developer wait for 50% of the houses being booked first and will the plaintiff

have to wait for sale and purchase agreement executed with potential buyers? Again, the agreement also provides for that the "percentage shall be at the discretion of the defendant."

As such this court takes the view that this agreement contains an element of uncertainty. During good economic condition selling 50% of the houses may not be a problem but if there is downturn in the state of our economy any developer will be hard pressed to sell 50% of their houses. Then if the developer feels that selling 50% of the houses may not be in their interest, they have the discretion to vary the figure!

If no time is provided in the agreement then a reasonable time must be given.

The defendant said the reasonable time to commence work would be dependent upon the three conditions in cl. 9 of the agreement. Learned counsel for the defendant said it was only on 14 April 1993 that the defendant applied for a housing developers licence. This is because, the transfer of the said land was only registered in 1993.

The court notes that there is evidence to show that the plaintiff executed the document of transfer - form 14 A - on 28 March 1992. This was never challenged. This date is almost one year earlier than the date of the defendant applying for a housing developers licence.

The two parcels of land were registered in the name of the defendant on 27 October 1993. Surely the date of registration of the transfer cannot be the reason for the delay in applying for the housing developers licence because the defendant applied for the said licence before the transfer of the said land was registered.

Looking through schedule A of housing developers (Control and Licensing) Regulations 1989 - Regulation 3(1) - Application for a housing developer's Licence the particulars required to be submitted are as follows:

(a) a copy of the land title;

(b) a copy of an approval for the conversion of the lands for building purpose and for the sub-division; (This was approved on 20 February 1989 as reflected at p. 61 ID.)

(c) a copy of the agreement between the land owner and the developer to develop the lands into housing development;

(d) a copy of the latest audited balance sheet;

(e) a copy of a statutory declaration stating to the effect that the applicant has complied with all the conditions or restrictions set out in s. 6(1) of the Act; and

(f) a copy of the particulars in form 24 under the Companies Act 1965 (for limited company only).

This means that by 20 February 1989, the defendant was already in the position to apply for the housing developer's licence. But they did not do it and no explanation was offered.

This court notes that the reason for the defendant not applying for the housing developer's licence any earlier was not given other than suggesting that the property must be transferred to them first. This argument is untenable.

The defendant also failed to address the issue raised in the letter from the defendant dated 5 November 1995 to the solicitors of the plaintiff. Paragraph 2 of the letter said as follows:

> Untuk maklumat tuan, pembinaan tidak dapat di teruskan oleh Syarikat ini kerana lesen pemaju perumahan tidak dapat di keluarkan oleh pihak pengawal Perumahan kepada Sri Rambai Sdn. Bhd. atau Prime Development Sdn. Bhd.

The said letter was well after the letter forwarding all the documents required on 14 April 1993 (page 73 ID) and the letter from the controller of housing dated 22 April 1993 (page 75 ID).

A letter to reply the letter from the controller of housing dated 22 April 1993 was not adduced to this court. Neither was any explanation offered nor evidence produced.

All the letters produced *ie*. at pp. 73 ID (dated 14 April 1993); 75 ID (dated 22 April 93) 77 ID (dated 20 April 1993) were well before the letter at p. 57 ID (dated 5 November 1995).

In the final analysis the housing developer's licence was not granted to the defendant and this was out lined in the final letter that was produced before this court regarding the application for licence made by the defendant.

Must the defendant possess a housing developer's licence before commencing with the construction work? The answer is in the affirmative. Section 5(1) of the Act said no housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act. It is clear that a housing developer must be in possession of a licence issued under the Act before it engages in carrying on or undertaking the housing development. Justice Anuar

said that "this is an absolute prohibition", p. 447 *Keng Soon Retnam (supra)*. It has also been stated by the Judicial Committee of the Privy Council in the same case that the issue of illegality stemming from the unlicensed nature of the defendant's business was substantial issue of fact and held that as the contract has been prohibited by the Act, then the result is that such a contract is void and unenforceable pursuant to s. 24 Contract Act 1950.

A court will not enforce a contract which is expressly or impliedly prohibited by statute. The Supreme Court said that "... in our view, it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably by read from the wording of the language of the statute itself, per Hashim Yeop A. Sani CJ in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 MLJ 356 at p. 361 F left.

The court takes judicial notice of the fact and refuses to enforce the contract even though its illegality has not been pleaded... The fact that the Housing Development Act 1966 is a legislation with the primary intention of protecting the consumer makes the contract clearly one which 'on its face' is illegal:

*Archbolds (Freightage) Ltd v. S Spanglett Ltd* [1961] 1 QB 374 quoted by Anuar J in *Keong Soon Retnam* at p. 450 F.

It is necessary to look at the agreement proper. The defendant argued that the agreement is a contingent or to use the word of their learned counsel a 'conditional' agreement within the meaning of s. 32 of Contracts Act 1950. The commencement of the construction works depends on cl. 9(i),(ii) and (iii) of the agreement.

The case of *National Land Finance Cooperative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] 2 MLJ 211 was given as authority where "the purchaser shall complete the purchase within 14 days after obtaining approval from FIC or within three months after the date of application to the FIC as aforesaid pursuant to cl. 3 hereof, whichever is the later, by paying to the vendor's solicitor ... the balance of the purchase price amounting to RM7,650,000."

There is a specific time mentioned in the agreement and the Federal Court held that the agreement became *void* because of the refusal of FIC to approve the sale over which the parties had no control.

Learned counsel for the defendant also gave as authority the case of *Lee Yew Hin v. Kow Lup Pion (supra)*. But at p. 116, it could be seen that cl. 10 of the agreement provided that "time wherever stipulated in the agreement shall

always be deemed to be of the essence of the agreement." There is no need to add further to what has been stated earlier by this court on cl. 9(i), (ii) and (iii) of the agreement.

What is needed is to examine is cl. 7 of the agreement. The learned counsel for the defendant argued that this clause is wide and sufficient for the plaintiff to seek a remedy in the event of default or inability to perform.

The defendant alleged that the plaintiff failed to comply to the provisions of cl. 7 in that the plaintiff failed to give the required of three months notice.

The words of cl. 7 used are clear as follows:

> In the event that the Developers **are unable to complete the dwelling house**, the landowner shall give notice in writing to the Developers three (3) months to **re-commence** construction and completion of the dwelling houses from the date of receipt of such notice ...

This court is of the view that cl. 7 would only apply if the defendant has "commenced" construction but for one reason or other he has stopped and "unable to complete the dwelling house."

In such a situation then the plaintiff must give three months notice in writing to recommence construction.

Clause 7 is also not applicable in this case as the Act has not been complied with by the defendant as up to the date of hearing the defendant has yet to be given with the housing developers licence. Hence the defendant could not have commenced any construction work. Clause 7 does not apply and therefore there is no need for the plaintiff to give three (3) months notice. As there is no other provision in the agreement to cater for such situation the letters dated 20 July 1995, 18 October 1995, 30 October 1995 (at pp. 50, 52, and 54 ID. respectively) together with the notice as contained in the letter dated 10 January 1996 can be considered as sufficient notice of termination. All the letters were sent by Messrs Idris & Co the solicitor then acting for the plaintiff. The agreement was therefore reasonably and properly terminated.

Turning the validity of the agreement and authorities this court is of view that the agreement dated 1 January 1989 is null and void. The defendant, not being a licensed housing developer cannot possibly develop the said land of the plaintiff and would not therefore be able, on their own, to deliver 17 units of houses to the plaintiff.

This court also accepts the argument of the learned counsel for the plaintiff that the agreement is prohibited by statute. Such being the case, the transfer documents at pp. 45, 46, 47 and 48 ID though registered with the Pentadbir

Tanah Daerah Kluang, cannot effectively transfer the rights title and interest to the defendant as its registration was obtained by means of void instrument. The transfer, in light of what has been stated earlier, is prohibited by the written law for the time being in force, *ie*, the Housing Developers (Control and Licensing Act) 1966. Hence the rights title and interest in the said land shall not be indefeasible.

After listening to the submissions of learned counsel for the plaintiff and learned counsel for the defendant, and after reviewing not only their submissions but also the authorities offered, this court hereby order in terms of the prayers a, b, c of encl. 2 and the defendant do pay costs to the plaintiff.